

US Bank Natl. Assn. v Mandel
2014 NY Slip Op 30687(U)
March 5, 2014
Supreme Court, Suffolk County
Docket Number: 39540/09
Judge: Paul J. Baisley
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

11/7/13

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

-----X
US BANK NATIONAL ASSOCIATION, AS
SUCCESSOR TRUSTEE TO BANK OF
AMERICA, NATIONAL ASSOCIATION,
(SUCCESSOR BY MERGER TO LASALLE
BANK NATIONAL ASSOCIATION) AS TRUSTEE
FOR MORGAN STANLEY LOAN TRUST
2007-8XS,

Plaintiff,

INDEX NO.: 39540/09
MOTION DATE: 11/7/13
MOTION NO.: 002 MOT D; 003 MD

PLAINTIFF'S ATTORNEY:
HOGAN LOVELLS US LLP
875 Third Avenue
New York, N. Y. 10022

-against-

GROSS, POLOWY & ORLANS, LLC
Co-Counsel for Plaintiff
25 Northpointe Park, Suite 25
Amherst, N. Y. 14228

NEAL W. MANDEL, BRENDA HESKETT
KINNAN, CHASE MANHATTAN MORTGAGE
CORPORATION, PEOPLE OF THE STATE
OF NEW YORK, THOMAS KINNAN, U B
VEHICLE LEASING INC., ZOLAR ASSOCIATES
LP, JOHN DOE (Said name being fictitious, it being
the intention of Plaintiff to designate any and all
occupants of premises being foreclosed herein,
and any parties, corporations or entities, if any,
having or claiming an interest or lien upon the
mortgaged premises.),

DEFENDANT'S ATTORNEY:
DeLISA LAW GROUP, PLLC
475 Montauk Highway
West Islip, N. Y. 11795

Defendants.

-----X

Upon the following papers numbered 1 to 37 read on this motion for summary judgment and an order of reference :
Notice of Motion/ Order to Show Cause and supporting papers 1-22 ; Notice of Cross Motion and supporting papers 23-32 ;
Answering Affidavits and supporting papers 33-34 ; Replying Affidavits and supporting papers 35-37 ; Other ; (and after
hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 002) of plaintiff US Bank National Association, as Successor Trustee to Bank of America, National Association (Successor by Merger to Lasalle Bank National Association) as Trustee For Morgan Stanley Loan Trust 2007-8XS ("US Bank"), pursuant to CPLR R. 3212 for summary judgment on its complaint, to strike the answer and defenses of the defendant Neal W. Mandel (Mandel), for a default judgment as against the non-appearing, non-answering defendants, and for an order appointing a referee to compute pursuant to Real Property Actions and Proceedings Law §1321, is denied; and it is further

ORDERED that the branch of plaintiff's motion seeking leave to amend the caption of this action pursuant to CPLR R. 3025(b) is granted; and it is further

ORDERED that the caption is hereby amended by substituting Kevin Franklin, Maria Rodriquez and Latisha Rodriguez for defendant "John Doe" and by striking therefrom the remaining defendants sued herein as "John Doe"; and it is further



ORDERED that plaintiff is directed to serve a copy of this order amending the caption of this action upon the Calendar Clerk of this Court; and it is further

ORDERED that the caption of this action shall hereinafter appear as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

X

**US BANK NATIONAL ASSOCIATION, AS SUCCESSOR
TRUSTEE TO BANK OF AMERICA, NATIONAL
ASSOCIATION (SUCCESSOR BY MERGER TO LASALLE
BANK NATIONAL ASSOCIATION) AS TRUSTEE FOR
MORGAN STANLEY LOAN TRUST 2007-8XS
3476 Stateview Boulevard
Ft. Mill, SC 29715**

Plaintiff,

-against-

**NEAL W. MANDEL, BRENDA HESKETT KINNAN,
CHASE MANHATTAN MORTGAGE CORPORATION,
PEOPLE OF THE STATE OF NEW YORK, THOMAS
KINNAN, U B VEHICLE LEASING INC., ZOLAR
ASSOCIATES LP, KEVIN FRANKLIN, MARIA
RODRIGUEZ, LATISHA RODRIGUEZ,**

Defendants.

X

And it is further

ORDERED that the branches of the cross-motion (motion sequence no. 002) of defendant Mandel for an order pursuant to CPLR §3126 (1), (2) and (3) are denied; and it is further

ORDERED that the remaining relief requested by defendant Mandel, not properly set forth in his notice of cross-motion, is denied pursuant to CPLR R. 2214(a).

This is an action to foreclose a mortgage on premises known as 8 Cherry Street, Central Islip, New York. It is alleged that on December 15, 2005, defendant Mandel executed a note in favor of First Financial Equities, Inc. ("First Financial") agreeing to pay \$320,000.00 at the yearly rate of 8.750 percent. It is also alleged that on December 15, 2005, defendant Mandel executed a mortgage in the principal sum of \$320,000.00 on his home. The mortgage indicated First Financial to be the lender and Mortgage Electronic Registration Systems, Inc. ("MERS") to be the nominee of First Financial as well as the mortgagee of record for the purposes of recording the mortgage. Thereafter, effective February 9, 2006, defendant Mandel and First Financial entered into a loan modification agreement which established a new unpaid principal balance of \$288,000.00. Thereafter, on

September 1, 2009, the mortgage was transferred by assignment from MERS, as nominee for First Financial, to plaintiff US Bank and recorded on October 1, 2009 with the Suffolk County Clerk's Office.

America's Servicing Company ("ASC") sent a notice of default dated May 17, 2009 to defendant Mandel stating that he had defaulted on his mortgage loan and that the amount past due was \$8,990.68. As a result of defendant's continuing default, plaintiff commenced this foreclosure action on October 7, 2009. In its complaint, plaintiff alleges in pertinent part that defendant breached his obligations under the terms of the note and mortgage by failing to make the monthly payments commencing with the April 1, 2009 payment. Defendant interposed an answer with ten affirmative defenses and three counterclaims. Plaintiff submitted a reply to defendant's counterclaims.

The Court's computerized records indicate that a foreclosure settlement conference was held on April 14, 2011. Thus, there has been compliance with CPLR §3408 and no further settlement conference is required.

Plaintiff now moves for summary judgment on its complaint contending that defendant Mandel failed to comply with the terms of the loan agreement and mortgage, that his answer raised no issues of fact for trial and that no valid affirmative defenses were raised by the defendant. In support of its motion, plaintiff submits, among other things: the sworn affidavit of Adam Seeman, vice president of loan documentation for Wells Fargo Bank, N.A. d/b/a America's Servicing Company ("Wells Fargo"); the affirmation of Leah Rabinowitz, Esq.; copies of the pleadings; the note endorsed to plaintiff, mortgage, loan modification agreement and assignment of mortgage; a notice of default; notices pursuant to RPAPL §§1320, 1303 and 1304; the affirmation of Leah Rabinowitz, Esq. pursuant to the Administrative Order of the Chief Administrative Judge of the Courts (AO/431/11); affidavits of service for the summons and complaint; an affidavit of service of the instant summary judgment motion upon the attorneys for defendant Mandel; and a proposed order appointing a referee to compute.

Defendant, in opposition to the summary judgment and in support of his cross-motion contends, *inter alia*, that plaintiff's proffered note submitted with its summary judgment motion is a forgery and accordingly, plaintiff lacks standing to foreclose on defendant's mortgage.

"[I]n an action to foreclose a mortgage, a plaintiff establishes its case as a matter of law through the production of the mortgage, the unpaid note, and evidence of default" (*Republic Natl. Bank of N.Y. v O'Kane*, 308 AD2d 482, 764 NYS2d 635 [2d Dept 2003]; *see Argent Mtge. Co., LLC v Montesana*, 79 AD3d 1079, 915 NYS2d 591 [2d Dept 2010]). Once a plaintiff has made this showing, the burden then shifts to defendant to establish by admissible evidence the existence of a triable issue of fact as to a defense (*see Washington Mut. Bank v Valencia*, 92 AD3d 774, 939 NYS2d 73 [2d Dept 2012]).

Where, as here, standing is put into issue by the defendant, the plaintiff is required to prove it has standing in order to be entitled to the relief requested (*see Deutsche Bank Natl. Trust Co. v Haller*, 100 AD3d 680, 954 NYS2d 551 [2d Dept 2011]; *US Bank, NA v Collymore*, 68 AD3d 752, 890 NYS2d 578 [2d Dept 2009]; *Wells Fargo Bank Minn., NA v Mastropaolo*, 42 AD3d 239, 837 NYS2d 247 [2d Dept 2007]). In a mortgage foreclosure action "[a] plaintiff has standing where it is the holder or assignee of both the subject mortgage and of the underlying note at the time the action is commenced" (*HSBC Bank USA v Hernandez*, 92 AD3d 843, 939 NYS2d 120 [2d Dept 2012]; *US Bank, NA v Collymore*, 68 AD3d at 753; *Countrywide Home Loans, Inc. v Gress*, 68 AD3d 709, 888

NYS2d 914 [2d Dept 2009]). Here, plaintiff has not established to the Court's satisfaction, *prima facie*, that it had standing to commence this action. The affidavit of defendant Neal Mandel submitted in opposition to plaintiff's motion and in support of his cross-motion reflects his allegation that the copy of the note annexed to plaintiff's motion papers as part of Exhibit B is a forgery. He acknowledges that he executed a note in favor of plaintiff's assignor, but avers that he did not execute the note proffered by plaintiff but only the note attached to his own papers as Exhibit D. It is undisputed that the note relied on by plaintiff bears an endorsement to the order of plaintiff, which endorsement is not present on the copy of the note acknowledged by defendant to be genuine. It is further apparent that the signatures on the two documents, while similar, are not identical.

While a bare allegation of a forgery is generally insufficient to create an issue of fact (*State Bank of Albany v McAuliffe*, 97 AD2d 607, 467 NYS2d 944 [3d Dept 1983]), in these circumstances, where plaintiff has failed to explain the existence of two apparently different versions of the signed promissory note, defendant's allegation is sufficient to raise an issue of fact that precludes summary judgment. In light of the foregoing, plaintiff's motion must be denied at this juncture. To the extent defendant's cross-motion may be read to seek summary judgment dismissing plaintiff's complaint, the same fact issues mandate denial of the cross-motion.

To the extent defendant also cross-moves for relief under CPLR §3126, the request is denied. Pursuant to CPLR §3126, a Court may strike a pleading as a sanction if a party "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR §3126; *see Moray v City of Yonkers*, 76 AD3d 618, 906 NYS2d 508 [2d Dept 2010]; *Mazza v Seneca*, 72 AD3d 754, 899 NYS2d 294 [2d Dept 2010]; *Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654, 896 NYS2d 152 [2d Dept 2010]). The nature and degree of the penalty to be imposed pursuant to CPLR §3126 lies within the sound discretion of the trial court (*see* CPLR 3126 [3]; *Bernal v Singh*, 72 AD3d 716, 898 NYS2d 858 [2d Dept 2010]; *Kihl v Pfeffer*, 94 NY2d 118, 700 NYS2d 87 [1994]). Actions should be resolved on their merits whenever possible and the drastic remedy of striking a pleading should not be employed absent a clear showing that the failure to comply with discovery demands is willful and contumacious (*see* CPLR 3126[3]; *Kyung Soo Kim v Goldmine Realty, Inc.*, 73 AD3d 709, 901 NYS2d 89 [2d Dept 2010]; *Byrne v City of New York*, 301 AD2d 489, 753 NYS2d 132 [2d Dept 2003]; *Bach v City of New York*, 304 AD2d 686, 757 NYS2d 759 [2d Dept 2003]; *Payne v Rouse Corp.*, 269 AD2d 510, 704 NYS2d 484 [2d Dept 2000]; *Espinal v City of New York*, 264 AD2d 806, 695 NYS2d 610 [2d Dept 1999]). The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders, and the absence of any reasonable excuse for these failures (*see Pirro Group, LLC v One Point St., Inc.*, 71 AD3d 654; *Workman v Town of Southampton*, 69 AD3d 619, 892 NYS2d 481 [2d Dept 2010]; *Dank v Sears Holding Mgt. Corp.*, 69 AD3d 557, 892 NYS2d 510 [2d Dept 2010]).

Here, there was no such clear showing that plaintiff's conduct was willful and contumacious. Accordingly, the Court in its discretion declines to dismiss the complaint. Furthermore, the Court is unable to ascertain based upon the submissions to what extent plaintiff has or has not complied with defendant's discovery demand. In defendant's cross-motion, counsel for defendant maintains that plaintiff "never produced the documents requested in the discovery notice." However, plaintiff's reply affirmation affirms that on "November 14, 2012, [she] received a copy of correspondence from Mandel's counsel, dated October 19, 2012, regarding Defendant's 'First Notice for Discovery & Inspection.'" On November 14, 2012, [she] responded by e-mail, noting that the documents produced as summary judgment exhibits are the same documents that Plaintiff would have produced in

response to Defendant’s discovery demand.” Furthermore, based upon the affirmation of plaintiff’s counsel, it would appear that defendant was provided a copy of the pooling and servicing agreement in connection with the defendant’s discovery request. Defendant, in reply and in further support of his cross-motion, does not deny having received the aforementioned discovery and does not set forth, with any specificity, what documents requested in the discovery notice have not been produced by plaintiff.

To the extent that either plaintiff or defendant have requested other forms of relief but have not supported such noticed forms of relief with any allegations of law or fact, the Court denies such applications.

The foregoing constitutes the decision and order of the Court.

Dated: March 5, 2014

PAUL J. BRUNBY, JR.

J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION